Florida beach erosion;
Photo: Sun Sentinel

Today the U.S. Supreme Court hears oral arguments in the most consequential environmental case of the current Term: *Stop the Beach Renourishment v. Florida Department of Environmental Protection*, No. 08-1151. This case bears close watching, for several reasons.

First, the litigation represents the Roberts Court's first foray into the longstanding legal and policy debate pitting environmental protection and property rights protected under the Takings Clause of the U.S. Constitution. The Rehnquist Court was seemingly obsessed with takings jurisprudence, deciding at least one case on the subject each Term between 1978 and the end of Rehnquist's tenure in 2005. By contrast, the Roberts Court has avoided this contentious area of constitutional and environmental law–until now.

Second, the most prominent issue presented by the *Stop the Beach Renourishment* case involves the concept of "judicial takings"–a principle the justices have heretofore failed to embrace. Past Supreme Court takings cases have involved the question of whether regulators–or, occasionally, legislators–have "taken" private property so as to require payment of compensation to the property owner. In this case, by contrast, the question is whether courts–here the Florida Supreme Court–can similarly "take" private property via their judicial decision-making. If the Supreme Court were to embrace such a theory, the judicial takings doctrine could be expected to raise significant federalism concerns. That's because such judicial takings cases will undoubtedly be filed in federal courts, asking federal judges to second-guess the constitutional propriety of state court decisions.

Third, this and other controversial aspects of the *Stop the Beach Renourishment* case have triggered a veritable avalanche of amici briefs supporting both sides. Most prominent among them are filings by the Obama Administration and a coalition of 26 states (led by California), both in support of the Florida state and local government respondents in the case. (Copies of all the parties' and amici's briefs in the case can be found here.) Indeed, the U.S. Solicitor General will share oral argument time with the Florida respondents before the justices today.

Finally, this case has strong climate change overtones. The litigation results from Florida state legislation which, following numerous hurricanes and tropical storms

that severely damaged the Florida coast, permitted government officials to undertake publicly-funded and administered beach replenishment programs. That same legislation, however, fixes the ocean shoreline boundary between sovereign tidelands and privately-owned uplands, in a fashion different from prior Florida property law. (The issue is whether this statutory change to Florida state law triggers a compensable taking of private property.) In this sense, *Stop the Beach Renourishment* is a harbinger of future legal conflicts that will undoubtedly arise throughout the United States, as the effects of climate change–such as sea level rise and intensified storm activity–change land forms and spawn boundary disputes such as the one now playing out before the Supreme Court.

The justices will issue their decision in the *Stop the Beach Renourishment* case by the end of June.